Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAY F. SHACHTER,

Petitioner,

v.

LINDA E. SHACHTER,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

Do the due process clauses of the Fifth and Fourteenth Amendments protect the fundamental liberty interests of marriage and child care and custody, as well as the State's division of property, from the preclusion of an adversary hearing on grounds under a dissolution of marriage statute mandating such a hearing?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jay F. Shachter respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois entered in this proceeding on March 31, 1998.

OPINIONS BELOW

The order of the Appellate Court of Illinois, First District was unreported (App. 1-35). The denial of the Petition for Leave to Appeal by the Supreme Court of Illinois was unreported (App. 37).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257. A timely Petition for Rehearing was filed in the Appellate Court of Illinois, First District on April 21, 1998; it was denied by Order of May 18, 1998 (App. 36). A timely Petition for Leave to Appeal to the Supreme Court of Illinois was filed on June 22, 1998. The order denying the Petitioner's Petition for Leave to Appeal was entered by the Supreme Court of Illinois on October 6, 1998.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

On January 18, 1994, the Circuit Court of Cook County, Illinois, Domestic Relations Division, commenced a trial in the case of "Linda E. Shachter ("Wife"), Petitioner, and Jay F. Shachter ("Husband"), Respondent," a cause for dissolution of marriage. The parties had two minor daughters.

The trial began with the Wife attempting to establish grounds for the dissolution, which the Husband opposed.

In 1977, the Illinois State Legislature enacted the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/401, et seq. Section 5/401(a)(1) set forth numerous grounds for obtaining a dissolution, such as adultery and physical or mental cruelty, all of which had been present in the State's prior statute governing actions for divorce.

Section 5/401(a)(2) was new and provided that a dissolution of marriage could be granted if the following ground "has been proved:"

> "That the spouses have lived separate and apart for a continuous period in excess of 2 years and irreconcilable differences have caused the irretrievable breakdown of the marriage and the court determines that efforts at reconciliation have failed or that future attempts at reconciliation would be impracticable and not in the best interests of the family."

A finding that grounds for dissolution exist then authorizes the court to determine custody, set allowances and divide property, 750 ILCS 5/401(b).

The Wife proceeded to attempt to prove the ground set forth in 5/401(a)(2). The Husband's attorney rose to cross-examine the Wife after she testified she had moved out of the marital residence more than two years before the trial began, that irreconcilable differences had arisen, that marriage counseling had been a failure, that the marriage was irretrievably broken, and that further attempts at reconciliation would not be in the best interests of the family.

The court prohibited the cross-examination, stating, "Miss Klepak, the grounds are irreconcilable differences. How can you contest them?" The court then rejected the attorney's argument that she was entitled to show the Wife's testimony to be untruthful, particularly with regard to the two years of separation, and by using excerpts from her journal to demonstrate ambivalent feelings about the Husband and the dissolution.

The court further would not allow the Husband to offer his own testimony on grounds; it did allow the presentation of an offer of proof under which the Husband's testimony would have been that the parties had not been separated for two years, that no meaningful attempts at reconciliation had been made, and that no differences were irreconcilable.

Upon rejecting both cross-examination of the Wife, and direct testimony by the Husband, the trial court found proof of the 5/401(a)(2) grounds. A dissolution of the parties' marriage was ultimately granted on that basis. The remainder of the judgment assigned custody of the children to the Wife, divided the parties property, and set child support and maintenance.

The Appellate Court of Illinois, to which it had been argued that proceeding to judgment in this manner was violative of due process, stated as follows:

> "Here, the petitioner established irreconcilable differences. She testified that she and the respondent had lived separate and apart for more than two years; that irreconcilable differences existed between them; that their efforts at reconciliation had failed; and that future reconciliation attempts would not be in the best interests of the family. *Once these elements were established, any endeavor by the respondent to disprove them would have been futile since the court was obligated to grant dissolution based upon the petitioner's testimony alone.*" (App. 33-34, emphasis supplied)

Though having previously noted that procedural due process requires notice and an opportunity to be heard and conduct a defense (App. 34), the Appellate Court affirmed the judgment.

REASONS FOR GRANTING THE WRIT

The denial of the Husband's procedural due process rights is self-evident. As stated in *Powell v. Alabama*, 287 U.S. 45 (1932), due process requires notice and hearing as essential to the entry of an enforceable judgment, and:

> "If in any case, *civil* or criminal, a *state* or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and,

therefore, of due process in the constitutional sense." (287 U.S. at 71; emphasis supplied)

This attack is not on the statute itself, which is the normally unassailable exercise of a state legislature's prerogative, *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), nor on the State's authority to create the mechanics of dissolution, but on the judicial interpretation of it, which is state action reviewable under the Fourteenth Amendment, *Bouie v. Columbia*, 378 U.S. 347 (1964). In sum, Petitioner posits that he was deprived of the liberty interests of sustaining his marriage and caring for his children, and that the State divided his property and income, when the predicate for doing so had to be established by a hearing denied to him.

The statute, as set forth above, requires elements to be "proved," including when the ground asserted is irreconcilable differences. These elements are 1) a two year separation; 2) the existence of irreconcilable differences; 3) the irretrievable breakdown of the marriage; and 4) either that attempts at reconciliation have failed or that future such attempts would not be in the best interest of the family.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that marriage "involves interests of basic importance in our society" and that since a dissolution of marriage could only be had by "invoking the State's judicial machinery," (401 U.S. at 376), due process was required and access to the courts to obtain a dissolution could not be denied for lack of a filing fee. The Court further noted that persons who necessarily must use the judicial process to resolve their rights and duties need be given an opportunity to be heard (401 U.S. at

377). What this Court has not previously decided is whether the right to continue the marriage, and protect one's child care interests, income, and property are equally subject to due process protection.

In *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970), it was stated that whenever fundamental rights are being deprived by state action (there, the termination of welfare benefits), the right to present evidence and cross-examine witnesses is elementary to due process. Both marriage, *Boddie v. Connecticut, supra*, and the care and custody of children, *Lehr v. Robertson*, 463 U.S. 248 (1983), have been determined to be fundamental interests to which the highest requisites of due process apply. Likewise, the taking of property without a hearing establishing the factual basis for doing so has been held violative of due process rights, *Fuentes v. Shevin*, 407 U.S. 67 (1972).

If the right to a dissolution must be so protected, so must be the right to oppose one, particularly where the statute governing dissolution creates elements of the cause of action. For example, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court found an eviction statute comported with due process since it allowed the defendant to present evidence on issues available under the statute. Section 5/401(a)(2) similarly creates issues and allows a defense, but the courts below have eradicated the due process right to invoke that defense. In so doing, they have allowed the Petitioner to be deprived of significant liberty interests, and of property, in the absence of constitutional protection.

In *Did Unilateral Divorce Raise Divorce Rates?*, University of California at San Diego, Leora Freidberg

(1997), it was stated that the enactment of no-fault statutes in 28 states between 1970 and 1985 contributed 16% of the increase in the dissolution rate in the United States. Each dissolution action affects at least one fundamental interest (marriage), and often, such as here, the care and custody of children, and the allocation of property. The facilitation of impacting on those fundamental interests by the enactment of no-fault legislation should not be enhanced by the failure to enforce that legislation consistent with due process.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

December, 1998

Respectfully submitted,

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APPENDIX

App. 1

[Dated March 31, 1998]

No. 1-95-1110

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:	)	
	)	Appeal from the
LINDA EHGARTNER-SHACHTER,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellee,	)	
and	)	No. 90 D 18276
	)	
	)	Honorable
JAY F SHACHTER,	)	Grace Dickler,
	)	Judge Presiding.
Respondent-Appellant.	)	

ORDER

This appeal follows the entry of a judgment for dissolution of marriage and an order amending the judgment for dissolution of marriage upon motion for reconsideration. The appellant raises the following issues: (1) that the best interests of the children required vacation of the joint parenting agreement and completion of the custody hearing; (2) that the amount of reimbursement to the marital estate for expenditures made on behalf of petitioner's non-marital estate was undervalued and against the manifest weight of the evidence; (3) that the division of marital property was against the manifest weight of the evidence; and (4) that respondent was denied a hearing on the issue of grounds.

The parties to this appeal, Linda Ehgartner-Shachter, the petitioner, and Jay F. Shachter, the respondent, were married in California on January 20, 1982. Two

children were born to the marriage: Margaret Ann ("Mimi"), who was born on May 17, 1983, and Hilda Suzanne ("T'hila"), who was born on October 10, 1984. Linda filed her petition for dissolution of marriage on December 4, 1990, alleging, as grounds, that the respondent was guilty of extreme and repeated mental cruelty. By leave of court, on March 12, 1993, Linda filed an amended petition in which she alleged irreconcilable differences as grounds for the dissolution.

At the hearing on January 18, 1994, Linda testified that she and Jay had lived separate and apart since July 18, 1991.[1] She stated that irreconcilable differences had arisen between herself and her husband; that they had obtained marriage counseling for three years prior to their separation; that counseling failed to prevent the irretrievable breakdown of their marriage; and that further attempts at reconciliation would not be in the best interest of the children. When asked to describe the conduct of her husband that caused irreconcilable differences, Linda testified to six incidents. The first occurred in November 1986 when her husband threw a plate of food on her head. The second occurred during the winter of 1987 when her husband ordered her at 4:30 in the morning to retrieve a newspaper and refused to let her go to the bathroom. The third occurred during Hanukkah 1988 on the Sabbath. On that occasion, Jay bruised her wrists while taking her hands off the faucet. The fourth incident occurred during Passover 1989. Linda testified that the children were

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[1] The testimony on the issue of grounds is taken from a Bystander's Report of Proceedings submitted by the respondent and certified by the trial court.

fighting and that Jay threw Mimi on top of a toy castle, cutting her thigh. The fifth occurred during the summer of 1990 while Jay was on a month-long business trip to Australia. Linda testified that Jay forgot to leave money for the family. She stated that when he called and she told him that she had no money, he told her to borrow on the line of credit on the house. Linda testified that she borrowed $5,000 and used that money to pay outstanding bills, food bills and doctor bills; and that her husband later accused her of forgery against the account. The sixth incident testified to by Linda occurred on April 23, 1991. Linda testified that on that date, Jay had put Mimi into the closet because she had been disobedient.[2] Linda further testified that she had not given her husband any reason to engage in the conduct she had described.

At the conclusion of Linda's direct examination, Jay's counsel attempted to cross-examine Linda regarding entries she had made in her diary. The trial judge interrupted, stating that grounds of irreconcilable differences could not be contested. The court then ordered a short recess. Thereafter, the trial judge returned indicating that grounds for irreconcilable differences had been proved by petitioner's testimony. The court indicated that the statutory ground of irreconcilable differences did not require proof that the petitioner was

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[2] During the custody hearing, the respondent admitted to placing a plate of food on the petitioner's head and placing Mimi in the closet as a disciplinary measure. He also stated that he had given petitioner money for expenses before he left on the business trip and that he did not sign an affidavit of forgery with the bank regarding the funds that the petitioner withdrew.

free from fault. Counsel for respondent then posed two questions to the judge. He asked whether the court's decision would be the same if Linda had not testified to the specific incidents and had only testified that the parties had lived separate and apart, that attempts at counselling took place before the two-year separation were a "total dismal failure" and that in her mind there was no chance of reconciliation. In his second question, counsel asked whether the court's decision would be the same if there had been no testimony as to the specific incidents but there had been direct testimony by the petitioner or through her journals that her feelings for the respondent were ambivalent. The trial court answered both questions in the affirmative.

The case proceeded to the custody phase when, after several days of testimony, the parties executed a joint parenting agreement (JPA) drafted by the attorney for the minor children. The JPA was entered by trial court order on April 11, 1994. In that agreement, the parties provided that Linda would be the permanent custodial parent for the minor children and that, as custodial parent, she would have responsibility for day-to-day decisions concerning the health, education and welfare of the children. The agreement further provided that Jay would have responsibility for decisions concerning the children's religious practices. It provided that the parties would consult each other on all significant decisions.

In the JPA the parties acknowledged that they and their children were of the Orthodox Jewish faith and that it was in the best interests of the children "that their social and cultural life style at all times adhere to

the tenets of the Orthodox Jewish lifestyle and teachings." The petitioner and respondent agreed that Mimi would attend the P'tach program at the Arie Crown School and that T'hila would attend Hillel Torah School. They agreed that neither parent would withdraw the children from these schools without the written permission of the other. Primary residence was to be with Linda but Jay was given liberal visitation which included alternate weekends from Friday afternoon until Sunday evening and every Wednesday evening until Thursday morning. Jay was also given the right to have dinner with one child, on an alternating basis, every Monday evening. With respect to the children's birthdays, the parties agreed to "co-host" and equally share the expenses of each child's birthday parties at which both parents would be in attendance. The parties further agreed to afford each other the opportunity to care for the children in the event that surrogate care-givers were needed for periods longer than 4 hours. They agreed to refrain from discussing each other in a derogatory or judgmental fashion in the presence of the children. Finally, the parties agreed to mediate any conflicts or disputes with a rabbi named in the JPA.

On June 10, 1994, the respondent filed an emergency petition for rule to show cause alleging various violations of the JPA by the petitioner, including petitioner's denial of visitation with Mimi, petitioner's exclusion of respondent from Mimi's birthday party, petitioner's failure to afford respondent the opportunity to care for the children instead of using a surrogate care-giver, petitioner's making disparaging remarks about respondent in front of the children, and petitioner's failure to

provide Mimi with required religious instruction. On June 30, 1994, before hearing on respondent's emergency petition, the trial court entered judgment of dissolution of marriage. That judgment included findings as to grounds, child support, insurance, education expenses, reviewable maintenance, and division of non-marital and marital property. It also awarded sole custody to the petitioner with reasonable rights of visitation to the respondent pursuant to the JPA which was incorporated into the judgment.

On July 29, 1994 the respondent filed a petition for reconsideration and for clarification. He filed an amended petition on November 21, 1994. In addition to seeking review of the monetary issues, the respondent sought vacation of the JPA, arguing that the petitioner had fraudulently induced him to end the custody hearing and enter into the JPA by making promises in the JPA that she did not intend to keep. The trial court conducted a hearing on the amended petition for reconsideration on January 29, 1995. With respect to the fraud allegation, the court indicated that it would limit testimony and not consider evidence of what happened subsequent to entry of the JPA. According to the court, the latter evidence, while relevant to the issue of modification, which was not pled, was irrelevant to the issue of fraud. At the conclusion of the hearing, the court found that the respondent failed to establish fraud on the part of the petitioner. By order dated February 9, 1995, the court amended various portions of the judgment for dissolution of marriage but denied respondent's request to vacate the JPA.

I. Joint Parenting Agreement

On appeal, the respondent argues that the trial court erred in refusing to vacate the joint parenting agreement. He argues that the court should not have entered the JPA because testimony at the custody hearing in progress at the time the JPA was entered showed that the parties could not cooperate. He also argues that the court should have vacated the JPA prior to its entry of final judgment under the court's inherent authority to vacate, amend and modify interlocutory orders and that the court should have taken additional testimony on the custody issue. He contends that, based upon the pre-JPA evidence, post-JPA evidence presented at the fraud hearing, and additional evidence yet to be presented, the best interests of the children may have required the court to award custody to him.

Initially we note that the parties agreed to the JPA before presenting it to the court for entry and that the court, before entering the joint parenting agreement, heard five days of testimony on the issues of grounds and custody. That testimony included extensive testimony of the parties; the court's in-chambers interviews of the minor children; psychiatric evaluations of the parties and the minor children conducted by Doctor Alan J. Ravitz, a clinical psychiatrist, which the parties stipulated could be considered by the court for custody purposes; and 1990 and 1994 reports of Doctor Rita P. Sussman, a clinical psychiatrist, who evaluated Mimi, the eldest daughter.

It is well established that the trial court is in a superior position to evaluate the evidence and determine the best interest of the children; and its decision

in that regard will not be reversed unless it is contrary to the manifest weight of the evidence. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 629 N.E.2d 679 (1994); *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 636 N.E.2d 691 (1993). In child custody cases, there is a strong presumption in favor of the result reached by the trial court. *In re Marriage of Hahin*, 266 Ill. App. 3d 168, 644 N.E.2d 4 (1994); *In re Marriage of Wright*, 212 Ill. App. 3d 392, 571 N.E.2d 197 (1991).

The respondent acknowledges these principles but argues that the trial court should not have "rubber-stamped" the JPA because the parties' testimony prior to entry of the JPA showed their inability to cooperate. In support of his contention that entry of the JPA was against the manifest weight of the evidence, he cites to cases dealing with joint custody awards. *E.g.*, *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 656 N.E.2d 215 (1995); *In re Marriage of McCoy*, 272 Ill. App. 3d 125, 650 N.E.2d 3 (1995); *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 629 N.E.2d 812 (1994); *Kocal v. Holt*, 229 Ill. App. 3d 1023, 595 N.E.2d 169 (1992). Those cases all stand for the proposition that joint custody should not be awarded when the parties have a history of disagreement and lack capacity to cooperate.

Here the parties did not agree to joint custody in their JPA nor did the court make such a custody award. The JPA provided that the petitioner would be the sole custodial parent and gave the respondent liberal visitation rights and responsibility for decisions concerning the minor's religious practices. While the JPA provided for the respondent's participation in the lives of his minor children, responsibility for day-to-day decisions concerning their health, education and welfare was

delegated to the custodial parent, the petitioner. Given the pre-JPA evidence of discord between the parties, the trial court could determine that the JPA, with its *award* of custody to the petitioner with liberal visitation rights to the respondent, was in the best interest of the minor children in accordance with section 602 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (Ill. Rev. Stat. 1991, ch. 40, par. 602 now codified at 750 ILCS 5/602 (West 1996)). So, too, the award of sole custody to the petitioner rather than the respondent was not against the manifest weight of the evidence since the parties asked for that disposition and since there was ample evidence to award custody to the petitioner, the mother of the minors who had been their custodial parent throughout the proceedings, except for a two-month period of time where the parties shared joint custody. The trial court was in the best position to evaluate the temperaments, personalities and capabilities of the parties in making its custodial determination. *Petraitis*, 263 Ill. App. 3d 1022, 636 N.E.2d 691. On the basis of the record before us, we cannot say that the trial court's determination in that regard was against the manifest weight of the evidence.[3]

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[3] Respondent also cites the cases of *In re Marriage of Michael*, 226 Ill. App. 3d 1088, 590 N.E.2d 998 (1992) and *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 617 N.E.2d 423 (1993) for the proposition that a trial court cannot "rubber-stamp" inappropriate agreements of the parties. However, for the reasons discussed, we do not find that the trial court merely "rubber-stamped" the JPA signed by the parties in the instant case. Moreover, the cases cited by the respondent have no relevance to the facts here. In Michael, the trial court erred in finding an extra-judicial agreement by the parties to modify child support enforceable. Similarly, the *Breyley* case has little

(continued...)

The respondent next contends that the trial court should have *sua sponte* vacated the JPA and refused to incorporate it in the judgment for dissolution of marriage once the court "heard evidence" that the petitioner had violated the JPA. In support of this contention, the respondent argues that the court had inherent power to vacate, amend, review or modify its interlocutory custody order entering the JPA before final judgment of dissolution. Respondent is incorrect. In rejecting this contention, we note that the respondent does not denote what evidence the trial court "heard" before entry of judgment. Our review of the record shows that, while the respondent filed a rule to show cause against the petitioner alleging JPA violations approximately two weeks before judgment was entered, no hearing on that petition occurred prior to entry of judgment. Second, we note that the court's order on April 11, 1991 entering the JPA was a final order. A custody order entered prior to judgment of dissolution, while not final for purposes of appeal, is final for purposes of modification when the substance of the order indicates its finality. Under those circumstances, a final custody order can only be modified pursuant to the strict standards of section 610 of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1991, ch. 40, par. 610 now at 750 ILCS 5/610 (West 1996)) which requires

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[3] (...continued)
relevance to the case at bar. In that case the parties were granted post-judgment relief in the form of vacatur of their marital settlement agreement because the written agreement did not express their actual agreement regarding child support and custody. Here there is no contention regarding the inaccuracy of the written JPA.

proof of child endangerment or changed circumstances. See *In re Marriage of Goldman*, 196 Ill. App. 3d 785, 554 N.E.2d 1016 (1990). Here, it is clear that the order entering the JPA on April 11, 1991 was a final order in that the custody issue was resolved by the parties and the hearing on custody then in progress was terminated. There is nothing in the record to suggest that the custody order was temporary or that the issue of custody was not fully adjudicated. See also *In re Marriage of Thompson*, 96 Ill. 2d 67, 449 N.E.2d 88 (1983) (trial court did not abuse its discretion in failing to reopen proofs on custody issue prior to entry of judgment). As a result, the order could only be modified in accordance with section 610, a remedy that the respondent is not seeking.

Moreover, the cases cited by the respondent to support his contention that the court's order entering the JPA was nonfinal and subject to modification prior to entry of the judgment for dissolution do not provide that support. The case of *Hart v. Valspar Corp.*, 252 Ill. App. 3d 1005, 625 N.E.2d 220 (1993) did not involve a JPA or a marriage dissolution proceeding. It involved the trial court's reconsideration of its order denying defendants, motion to dismiss where there was newly discovered evidence. Here there was no newly discovered evidence; rather, the respondent alleged post-JPA uncooperative conduct by the petitioner that was similar in nature to that which occurred prior to entry of the JPA and which the trial court was aware before that entry. The cases of *In re Marriage of Oertel*, 216 Ill. App. 3d 806, 576 N.E.2d 435 (1991) and *In re Marriage of Leopando*, 96 Ill. 2d 114, 449 N.E.2d 137 (1983) also are of no avail. *Oertel* and *Leopando* involved the

appealability of child custody orders entered before final judgment. Appealability is not in issue here. *Oertel* is further distinguishable because there the parties agreed to terminate their joint parenting agreement which provided for joint custody during post-judgment modification proceedings governed by section 610 of the Act. Here, the parties did not agree to terminate their JPA and respondent is seeking vacatur of the JPA in the original dissolution proceedings governed by section 602 of the Act.

As an additional reason for vacatur of the JPA, the respondent argued in his amended motion for reconsideration that he was fraudulently induced by the petitioner to sign the JPA. He alleged in that motion that the petitioner had entered into the JPA "in a deliberate effort to defraud [him] of his right to a contested hearing on custody." He also alleged:

> "a. That [petitioner] fraudulently misled and fraudulently coerced [respondent] into signing the Joint Parenting Agreement by offering [respondent] substantial and liberal visitation privileges with his minor children, in exchange for [respondent] abandoning his efforts to present evidence to this Court to obtain custody of his minor children; and
>
> b. [Petitioner] has engaged in a repeated and continuous course of conduct showing a lack of integrity, as well as deceitfulness which, had this trial court been advised of this conduct prior to the entry of its Joint Parenting Agreement on April 11, 1994, never would have entered such a Joint Parenting Agreement or made the same custody determination as found on page 2 paragraph 2 of

> its Judgment of Dissolution of Marriage entered June 30, 1994."

Respondent alleged that, had he been aware that after signing the JPA "he still would have been unable to visit with his minor child, MIMI, on a regular and continuing basis" he would not have signed the JPA.

A settlement agreement incorporated into a dissolution judgment is legal and binding on its face and is presumed valid. That presumption can be overcome by clear and convincing evidence that there was fraud in the inducement. *In re Marriage of Goldberg*, 282 Ill. App. 3d 997, 668 N.E.2d 1104 (1996) (marital settlement agreement); *Sarron v. Lyons*, 247 Ill. App. 3d 819, 617 N.E.2d 1247 (1993) (oral custody agreement). In order to establish fraud in the inducement, the complaining party must show that the other party falsely stated a material fact; the fact was intentionally misstated or concealed to induce the complaining party to act; and that the complaining party detrimentally relied upon the misstatement or the nonexistence of the fact. *Goldberg*, 282 Ill. App. 3d 997, 668 N.E.2d 1104. See also *In re Marriage of Fricke*, 174 Ill. App. 3d 191, 528 N.E.2d 370 (1988). An inference of fraud will not arise merely from proof of nonperformance of a promise. However, evidence that the promisor did not even make a pretense of carrying out his promise or evaded and refused to perform it may give rise to an inference of intention not to perform. *Fricke*, 174 Ill. App. 3d at 194, 528 N.E.2d at 372. The decision to modify a settlement agreement rests in the circuit court's sound discretion. *Goldberg*, 282 Ill. App. 3d 997, 668 N.E.2d 1104.

At that hearing on respondent's motion to vacate the JPA, the respondent testified that his reason for sign-

ing the JPA was to obtain liberal visitation with his children which was being denied to him by the petitioner. He then testified to incidents wherein the petitioner violated various terms of the JPA including those with respect to visitation. The petitioner confirmed instances wherein respondent did not have visitation with Mimi after the JPA was signed. She stated, however, that Mimi did not want to go with the respondent and that the relationship between Mimi and respondent had broken down. The petitioner also testified that after the JPA was signed she met with a therapist concerning Mimi and that she inquired as to what she could do to bring Mimi and the respondent closer together. She testified to various instances in which, on the advice of the therapist, she attempted to further the relationship between the respondent and Mimi. The testimony of both parties showed that the respondent's visitation with T'Hilla, the younger daughter, was generally in compliance with the terms of the JPA.

At the conclusion of the hearing, the court found that the respondent failed to establish fraud and denied respondent's request for vacatur. That decision was not an abuse of discretion. No direct evidence was presented regarding the petitioner's intent to defraud respondent by signing the JPA knowing that she did not intend to comply with its terms. The only circumstantial evidence presented by the respondent was testimony that the respondent did not obtain the liberal visitation rights promised him under the JPA, specifically that he was denied visitation with Mimi. That evidence did not create an inference of fraud since, at best, it was proof of nonperformance rather than proof of total lack of compliance with the JPA. See *Fricke*, 174 Ill. App. 3d

at 194, 528 N.E.2d at 372 (intention not to perform may be inferred from fact that promisor did not even make a pretense of carrying out his promise or evaded or refused to perform it). More convincingly, the evidence did not clearly establish that respondent's inability to have visitation with Mimi in accordance with the JPA was caused by the petitioner. The petitioner testified that Mimi refused to go with the respondent. There was no testimony that the petitioner encouraged that refusal or in any way prevented the visitation. To the contrary, there was evidence to show that the petitioner tried to further the relationship between the respondent and Mimi. Absent proof of total interference and noncompliance with the JPA, the respondent could not establish fraud and was bound by the JPA. See *Sarron v. LVons*, 247 Ill. App. 3d 819, 617 N.E.2d 1247 (1993) (petitioner bound by oral custody agreement in absence of fraud).

II. Property Division

The respondent next argues on appeal that the trial court's reimbursement to the marital estate for expenses it made on behalf of petitioner's non-marital estate and the court's division of marital property was against the manifest weight of the evidence.

The principal items of property involved in this issue are three parcels of real estate: a home in Pacific Grove, California; a home in San Jose, California; and the marital home on Whipple Street in Chicago, Illinois. The testimony at trial showed that the petitioner inherited the Pacific Grove home in 1984 upon her mother's death. Rental income was collected beginning about

March 1984. The respondent testified that the rent from that house was deposited in the parties, joint account for about two years and that thereafter the petitioner deposited the rent checks in her separate account. The rent collected between 1984 and 1988 totalled $43,925.00. The petitioner testified that, during the years of 1983 to 1987, monies totalling $17,500, derived from sources listed in the parties, tax returns, were used to pay the expenses such as the mortgage and real estate taxes. The respondent also testified that the mortgage payments and payments for insurance and water for the Pacific Grove house were paid during 1983 through 1987, from funds in the parties, joint account. He stated that repairs on that property totalling $3392 were paid with a combination of marital funds and respondent's non-marital assets although he did not know in what proportion. The respondent testified that the mortgage totalling $5,924.98 was paid off in 1987 with joint funds.

The court's judgment for dissolution found that the Pacific Grove house, valued at $250,000, was petitioner's non-marital property but ordered the petitioner to reimburse the marital estate in the amount of $7,213.98.

The San Jose property was originally owned by the petitioner and her second husband (the respondent was her third husband). Their divorce decree entitled either party to buy out the other's interest. The petitioner testified that she bought her former husband's interest in 1982 shortly after their divorce and her marriage to the respondent using funds given to her by the respondent. According to the petitioner, the respondent gave her a check in the amount of $26,000 of which $19,000

was used for the buy-out and $7,000 was used to reimburse her for expenditures she had made toward respondent's living expenses prior to their marriage. The respondent testified that he gave petitioner a check in the amount of $26,375 on June 15, 1982 to enable her to buy her former husband's interest in the San Jose property. At the time he gave her the check, he thought the entire amount was to be used for that purpose. The respondent stated that his check to the petitioner was drawn on a non-marital bank account which held his inheritance from his deceased father. He denied that the petitioner paid any of his living expenses prior to their marriage.

The respondent testified that from June 1982, when he left California and moved to Chicago for employment reasons, until January 1983, the mortgage payments on the San Jose property were paid equally by the petitioner and the respondent. He stated that during the time petitioner remained in California, which was until July 1983, the petitioner collected the rents and did not send the proceeds to him. He stated that, after the petitioner moved to Chicago, the tenants mailed their rent payments to his office; and he deposited those checks into the parties, joint account. He stated that all bills, including the mortgage payments were paid out of the parties joint account. On cross-examination, however, he admitted that in 1982 the petitioner made several mortgage payments on the property from her sole account and made other payments from their joint account.

In November 1983, the petitioner conveyed a 50% interest in the San Jose property to the respondent. Also at the time a second mortgage was obtained on the San

Jose property in the amount of $22,000. That mortgage was obtained shortly after the parties acquired the Whipple Street marital home in Chicago. According to the respondent, the second mortgage on the San Jose property was paid off in 1985 using respondent's employment income. In 1988, the first mortgage totalling $61,697.11 was paid off. The respondent testified that, although the certified check was issued from the parties, joint account, the funds for that transaction had been transferred to the joint account from respondent's non-marital account immediately prior thereto.

In February 1990, the petitioner deeded her one-half interest in the San Jose property to respondent. The respondent thereafter obtained a $35,000 mortgage on the San Jose property. He obtained the $35,000 mortgage for purposes of buying other property but, when that did not occur, he used the funds as follows: $10,000 to reduce the San Jose mortgage; $5,000 toward the line of credit on the marital home in Chicago; and the remainder for family expenses. The respondent admitted on cross-examination that, at the time petitioner deeded to him her 50% interest in the San Jose property, he signed a document in which he promised to give petitioner up to $150,000 in consideration for the transfer of her one-half interest to him.

In the judgment for dissolution, the trial court found that the San Jose property had a market value of $215,000 and equity of $193,000. It ordered that the property be sold and the proceeds divided equally after first giving petitioner $21,501.62, her one-half equity in the Whipple Street marital home less certain indebtedness to the respondent. The latter amount was reduced to $18,555.17 in the court's post-trial order amending

judgment. In making the award, the trial court found that respondent's substantial contribution of non-marital funds to the asset was a gift to the marriage. The court further found that petitioner's conveyance to respondent was not a gift.

The Whipple Street property, which was the marital home, was purchased in 1983. Respondent paid the $7,000 downpayment using his non-marital funds. Respondent took the property in his name only and assumed the seller's existing mortgage. Although respondent testified that he paid the downpayment using non-marital funds, he admitted on cross-examination that another check totalling $16,825, made payable to the sellers, was drawn on the marital account. During cross-examination, the respondent was shown a document which purportedly showed that a deposit was made into the parties' joint account on November 10, 1983. He denied that that deposit was related to the second mortgage of the San Jose property which was obtained in November 1983. Respondent testified that the balance of the mortgage on the Whipple Street property was $39,000 and that $15,000 was owed on an equity line of credit.

The trial court found the equity in the Whipple Street property to be $63,000 and ordered that it be divided equally. The court further found that the respondent presented no documentary evidence showing that the downpayment came from non-marital funds and did not overcome the presumption that the property was marital.

On appeal, respondent argues that the marital estate reimbursement of $7,213.98 from the Pacific Grove

property was grossly undervalued and was contrary to the manifest weight of the evidence. He argues that the evidence showed that all mortgage payments on the Pacific Grove property were made from either marital funds from a joint account or from his non-marital inheritance. He argues that he paid the mortgage balance of $5,924 and paid repair costs of $3,392 using marital and non-marital funds. He further argues that he paid $17,500 to maintain the property. He seeks reimbursement to the marital estate for these demonstrable contributions which he contends exceeds $27,000.

In response, the petitioner argues that the respondent failed to establish by clear and convincing evidence his contributions of non-marital funds toward the Pacific Grove property. (This response misconstrued respondent's argument as he was not seeking reimbursement to his non-marital estate.) She also argues that the evidence supports the trial court's conclusion that the marital estate be reimbursed the total sum of $7,213.98.

Initially, we note that the appellant has failed to provide this court with a complete transcript of the proceedings which occurred in the circuit court. It appears that at least one transcript, that for a February 1, 1994 hearing, and perhaps two are missing. Seemingly, the hearing on property issues began on February 1 as the transcript for the hearing on February 2, 1994 begins with a continuation of respondent's cross-examination of the petitioner and refers to petitioner's testimony that occurred "yesterday." There is no transcript containing petitioner's direct testimony during her case in chief on the property issues or the begin-

ning of her cross-examination by respondent's counsel.[4] In addition to the absence of transcripts, none of the numerous exhibits introduced into evidence by both of the parties have been included in the record on appeal. Presumably, the exhibits showed the parties, deposits, withdrawals and check issuances with respect to their various marital and non-marital accounts and with respect to their income and disbursements for their real estate properties. The appellant has the burden to present a sufficiently complete record of the proceedings at trial in order to support appellant's claims of error. Since the appellant has not done so, any doubts which may arise from the incompleteness of the record will be resolved against him. See *Moniuszko v. Moniuszko*, 238 Ill. App. 3d 523, 525 n.1, 606 N.E.2d 468, 470 n.1 (1992).

Section 503(c) of the Illinois Marriage and Dissolution Act (Ill. Rev. Stat. 1991, ch. 40, par. 503(c), now codified at 750 ILCS 5/503(c) (West 1996)) provides for the disposition of commingled marital and non-marital

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[4] The pages of the February 2, 1994 transcript are numbered with the prefix "F." There is no transcript bearing an "E" prefix in the record nor is there a transcript bearing the "G" prefix. Also, the February 2, 1994 transcript ends with the setting of the next hearing date for February 10, 1994. However, the next transcript in the record is for the hearing occurring on March 3, 1994 which bears a "H" prefix. That transcript also refers to petitioner's testimony which occurred "yesterday." There are no transcripts for hearings dated February 10 or March 2, 1994, one of which could have borne the "G" prefix. It may also be, however, that no hearings occurred on either February 10 or March 2 since the February 2, 1994 transcript ends with respondent's cross-examination of petitioner and the March 3, 1994 hearing begins with the resumption of respondent's cross-examination of the petitioner.

property. In accordance with subsection (3) of that provision, an estate must reimburse another estate when the latter makes a contribution to it notwithstanding any transmutation, provided, however, "that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift * * *." Ill. Rev. Stat. 1991, ch. 40, par. 503(c)(3) now at 750 ILCS 5/503(c)(3) (West 1996). A circuit court's division of property will not be reversed unless it is against the manifest weight of the evidence (*In re Marriage of Swanson*, 275 Ill. App. 3d 519, 656 N.E.2d 215 (1995)); that is, where "no reasonable man would take the view adopted by the trial court" (*In re Marriage of Pancner*, 111 Ill. App. 3d 546, 550, 444 N.E.2d 653, 656 (1982)). Credibility issues are reserved to the province of the trial court, which had the opportunity to hear the evidence and observe the demeanor of the witnesses. *In re Marriage of Nagel*, 133 Ill. App. 3d 498, 478 N.E.2d 1192 (1985).

Here, there is no dispute that the Pacific Grove property was the petitioner's non-marital asset which she inherited from her mother. The respondent disputes the amount of reimbursement to the marital estate for its contributions to that non-marital asset. He argues that the amount of reimbursement should have been $27,000 rather than $7,213.98. Apparently, the $27,000 figure is based upon respondent's allegations that the marital estate paid $17,500 to maintain the property; $3,392 for repairs; and $5,924 to pay off the mortgage.

The testimony at trial showed that rental income from the Pacific Grove property was collected beginning in 1983. The respondent testified that rents collected during the period of 1984 and 1988 totalled $43,925. He

also testified that the rental income from the Pacific Grove property was deposited in the parties' joint account for about the first two years. There was no dispute that the mortgage amounting to $5,924.98 was paid off in 1987 using funds from marital account.

Based upon this evidence and certain documentary evidence not before this court, the trial court found that the marital estate had expended $5,924.98 toward the final mortgage payment and $1,289 in other expenses on the Pacific Grove property during 1987 at a time when it was no longer receiving the Pacific Grove property's rental income. The court found that prior to 1987, the marital estate had received rental income from the Pacific Grove property and that that income was a gift. Due to the absence of a complete record on appeal, we must presume that the documentary evidence submitted by the parties at trial would have supported the trial court's finding that the marital estate received the Pacific Grove property's rental income until 1987 despite respondent's testimony that the petitioner kept the rental income after about two years. See *Moniuszko*, 238 Ill. App. 3d at 525 n.1, 606 N.E.2d at 470 n.1. We must also presume that the documentary evidence would show that the rental income from the Pacific Grove property exceeded that property's expenses which were paid with funds from the marital account. It is that excess which was presumed by the trial court to be a gift to the marital estate. It seems most obvious that, in receiving the benefit of the rental income, the marital estate simultaneously assumed the burden of the corresponding expenses. Thus, since the marital estate was receiving rental income from the Pacific Grove property prior to 1987, it was not entitled

to reimbursement for the expenses it paid on behalf of the Pacific Grove property during that same period. It was only entitled to recover those expenses that it paid when it was no longer receiving the rental income; that is, those expenses paid in 1987. Thus, the trial court's allocation of reimbursable expenses to the marital estate was not undervalued or contrary to the manifest weight of the evidence. Ill. Rev. Stat. 1991, ch. 40, par. 503(c)(3).[5]

Next the defendant argues that the trial court erred in dividing the marital property. He argues that the court did not consider the value of the non-marital property set aside to each spouse prior to dividing the marital property because the petitioner was awarded $247,000 in non-marital property and he was awarded less than $3,000 in non-marital property, namely, the proceeds remaining from his inheritance from his father

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[5] The fact that the expenses of the non-marital asset were paid by the marital estate after the marital estate had been gifted with income derived from the non-marital asset distinguishes this case from *In re Marriage of Ryman*, 172 Ill. App. 3d 599, 527 N.E.2d 18 (1988), a case cited by the respondent. In *Ryman*, the marital estate was entitled to reimbursement for its payment of premiums for the husband's non-marital insurance policies because the premiums were paid by the marital estate using funds that had not been derived from the non-marital asset. The case of *In re Marriage of Thacker*, 185 Ill. App. 3d 465, 541 N.E.2d 784 (1989) also is of no support to the respondent. There the court found that the husband's payment of the downpayment on the marital home using non-marital funds retained its non-marital identity and that the husband rebutted the gift presumption. That case has no relevance here where the marital estate, which made mortgage payments and other expenditures on behalf of the non-marital estate, had received income from the non-marital estate in excess of the marital estate's expenditures.

which at one time totalled $170,000. He also argues that the division of marital property was improper because he was awarded less than one-half of his contributions to the marital property. He specifically argues that until 1991 he was the sole support for the family; that the petitioner did not contribute her non-marital income from the Pacific Grove property to the marital estate; that he expended almost all of his non-marital money to acquire the marital estate and to "save" the San Jose property. He further argues that the inequitable distribution of property is not warranted by other factors considered in section 503(d) of the Act such as their income-earning abilities. According to the respondent, the parties had equal abilities to earn income.

The property distribution shows that the trial court awarded the petitioner the Pacific Grove property, a non-marital asset, valued at $250,000 less reimbursement to the marital estate of $7,213.98. The respondent was awarded various bank accounts totalling $2,950 as his non-marital property. The San Jose property, having an equity of $193,000, and the Whipple Street property, having an equity of $63,000, were determined to be marital property. The court ordered that the San Jose property be sold and that the proceeds be equally divided between the parties. The court awarded the Whipple Street home to the respondent but ordered him to pay petitioner her one-half interest of $31,500 in cash less certain indebtedness to him.

Initially, we note that respondent's contention that he was awarded less than one-half of the marital estate is baseless since as discussed above the court divided the marital estate equally between the parties. The respondent's contention that he was awarded less than one-

half of his contribution to the estate is also baseless. In this regard he argues that he expended almost all of his non-marital money to acquire the marital estate and to "save the San Jose property shortly after the marriage." With respect to the San Jose property, the court found that the value of respondent's interest in the San Jose property at the time he contributed his non-marital funds was far greater than the amount he paid to purchase his interest. The court also found that respondent used non-marital assets to retire the $61,697.11 mortgage on the San Jose property in October 1988. As to the latter payment, the court found that the payment was a gift to the marital estate. With respect to the Whipple Street marital home, the court found that the respondent presented no documentary evidence to substantiate his claim the down payment for that property was made with his non-marital funds.

As noted above, an estate which contributes assets to another estate shall be reimbursed from that estate provided such contribution is traceable by clear and convincing evidence and was not a gift to the marital estate. Ill. Rev. Stat. 1991, ch. 40, par. 503(c)(3), now codified at 750 ILCS 5/503(c)(3) (West 1996). When non-marital funds are contributed to a co-owned asset, there is a rebuttable presumption that the contribution of non-marital funds to a marital asset held in co-ownership constitutes a non-reimbursable gift. Ill. Rev. Stat. 1991, ch. 40, par. 503(b), now codified at 750 ILCS 5/503(b) (West 1996). *E.g.*, *In re Marriage of Nagel*, 133 Ill. App. 3d 498, 478 N.E.2d 1192 (1985); *Van Ness v. Van Ness*, 136 Ill. App. 3d 185, 482 N.E.2d 1049 (1985). The presumption of gift can only be rebutted by clear and convincing evidence. *Nagel*, 133 Ill. App. 3d 498, 478 N.E.2d 1192.

The testimony at trial showed that the respondent paid the balance of the San Jose mortgage with his non-marital funds to enhance the petitioner's credit rating. As the trial court found, this testimony does not rebut the presumption of a gift; it buttresses petitioner's contention that respondent's funds were advanced as a gift to the marital estate to maintain harmony in the marriage. Moreover, as to the Whipple Street marital home, the court found that the respondent did not substantiate his claim that he used non-marital funds to make the downpayment. The trial court viewed the credibility of the witnesses and the exhibits they introduced (the latter of which, as discussed above, were not included in the record on appeal). We cannot say that the conclusions reached, based on the evidence included in the record on appeal, are against the manifest weight of the evidence. Moreover, with respect to the documentary evidence that has not been submitted to this court, we must presume that it supports the trial court's determination. *Moniuszko*, 238 Ill. App. 3d at 525 n.1, 606 N.E.2d at 470 n.1.

The respondent argues that the trial court did not consider his "ten years of income that built the marital estate and supported the family." This argument fails to realize that it was respondent's income contributions to the marital estate that entitled him to an award of a portion of the marital estate. See Ill. Rev. Stat. 1991, ch. 40, par. 503(d)(1) now at 750 ILCS 5/503(d)(1) (West 1996). It also ignores petitioner's contributions to the acquisition and preservation or the marital property, such as her contributions to the family unit as a homemaker and her contributions of a portion of the rental income from the Pacific Grove property. Finally, it

ignores the other factors listed in section 503(d) of the Act relative to the division of marital property such as the economic circumstances of each spouse when the division of property becomes effective; the occupation, vocational skills, employability and needs of each of the parties; the custodial provisions for the children; and the reasonable opportunity of each spouse for future acquisition of capital assets and income. See *In re Marriage of Mayzner*, 144 Ill. App. 3d 645, 494 N.E.2d 615 (1986).

The respondent argues that the parties, income-earning capabilities are near equivalent. He states that his annual net income is $44,000 while the petitioner's annual gross income is $25,000. First, we note that to avoid distortion the comparison should involve the net income of both parties. when their net income figures are compared, the differential between the two figures is even greater than that professed by the respondent since petitioner's net income would be less than her gross income. Second, respondent's net income is understated. Based upon the court's child support award of $925 a month for the two children (which the court stated was 20% of respondent's net income), respondent's income would be closer to $55,400. Thus, the disparity in incomes is even greater than that professed by the respondent. In addition to the dollar disparity, we note that the trial court found that the parties possessed different educational backgrounds and skills. The record shows that the respondent possessed a doctorate in psychology and was earning his livelihood in the computer field, whereas the petitioner had not yet completed her undergraduate degree in education, was working as a substitute teacher, and during the mar-

riage had worked only on a part-time basis and earned very low wages. See *Mayzner*, 144 Ill. App. 3d 645, 494 N.E.2d 615. Moreover, while the petitioner's income would be supplemented by rental income received from the Pacific Grove property, the respondent's income would be supplemented by rental income from the basement apartment of the Whipple Street property. The differential between the two rental incomes would not require a greater apportionment of the marital property to the respondent given the other factors enumerated in section 503(d) discussed above.

The cases cited by the respondent do not require a contrary result. In *In re Marriage of Carney*, 122 Ill. App. 3d 705, 462 N.E.2d 596 (1984), the court reversed the trial court's distribution of the marital property in equal proportion finding that the distribution was inequitable based upon section 503(d) and the circumstances of the parties. The court found that the wife's health, occupation, vocational skills, and income required that she be awarded a greater portion of the marital property. Here, these factors do not weigh in the respondent's favor. There is no issue as to his health; and his earning capacity, vocational skills, and income are not less than but greater than the petitioners. Similarly, *Theeke v. Theeke*, 105 Ill. App. 3d 119, 433 N.E.2d 1311 (1981) does not support the respondent's argument. In that case, the court affirmed the award of sixty percent of the proceeds from the sale of the marital home and fifty percent of the husband's profit and savings plan based upon the wife's contributions to the marriage as a homemaker and given uncertainty as to her future net earning capacity even though she was currently earning only $500 less than

the husband. Here, as in *Theeke*, there is no uncertainty as to respondent's earning, capacity. In fact, *Theeke* supports the petitioner's award based upon her contributions to the marriage as a homemaker and based upon the fact that her earning capacity is uncertain.

III. Grounds

As his final argument on appeal, the respondent argues that the trial court erred by refusing to allow him to present evidence to contest grounds. He argues that he should have been given the opportunity to cross-examine the petitioner to disprove her case seeking dissolution of their marriage on the grounds of irreconcilable differences. He contends that, not having been allowed to cross-examine her, he was deprived of his procedural due process rights.

As discussed above, at the time of trial, the petitioner amended her petition for dissolution of marriage to change the grounds from mental cruelty to irreconcilable differences. At trial, she testified that she and the respondent had lived separate and apart since July 18, 1991; that irreconcilable differences had arisen between herself and the respondent; that they had obtained marriage counseling for three years prior to their separation and that counseling failed to prevent the irretrievable breakdown of their marriage; and that further attempts at reconciliation would not be in the best interest of the children. The petitioner also testified to instances of conduct by the respondent which caused the irreconcilable differences. (Those instances are described in detail in the fact section of this order.)

At the conclusion of the petitioner's testimony, the respondent began to cross-examine the petitioner, attempting to discredit her direct testimony with respect to irreconcilable differences. After calling a brief recess, the trial court indicated that the petitioner had established grounds and refused to allow further cross-examination of the petitioner on that issue. Respondent's counsel then asked the court whether its decision on grounds would have been the same if the specific incidents of respondent's alleged misconduct had not been proved and if testimony could establish that the petitioner's diary entries indicated that her feelings toward the respondent were ambivalent. The court responded in the affirmative.

Procedural due process requires that a party be afforded notice and opportunity to be heard and to conduct a defense. *Blaisdell v. Blaisdell*, 142 Ill. App. 3d 1034, 492 N.E.2d 622 (1986). When a party is seeking dissolution of the marriage based upon the fault grounds enumerated in section 401(a)(1) of the Illinois Marriage and Dissolution of Marriage Act, the respondent must be given the opportunity to defend and prove provocation by the petitioner or lack of fault. See *In re Marriage of Wade*, 158 Ill. App. 3d 255, 511 N.E.2d 156 (1987); *Yakin v. Yakin*, 107 Ill. App. 3d 1103, 436 N.E. 2d 573 (1982) (burden of proving lack of provocation remains with complaining party but burden shifts to defendant party once there has been a denial of provocation). This is not true, however, with respect to the "no-fault" provision of section 401(a)(2) of the Act. As noted in *In re Marriage of Smoller*, 218 Ill. App. 3d 340, 345, 578 N.E.2d 256, 259 (1991), by adopting that provision in 1984, the legislature recognized that the pub-

lic policy to preserve marriages was "no longer served when the State's interest in preserving a marriage is not also shared by the parties themselves." In *Smoller*, the court reversed the trial court's refusal to grant dissolution of the marriage on the ground of irreconcilable differences where the petitioner's testimony was contradicted by the respondent's testimony and where the respondent testified that she loved the petitioner and desired to maintain their marriage. In reversing, the appellate court held that section 401(a)(2) requires a finding of irreconcilable differences even where one of the parties desires to maintain the union and testifies to that fact at trial. In that regard the court stated:

> "Where evidence shows that one spouse clearly desires to no longer continue to be married to the other, an irreconcilable difference necessarily arises between them causing an irretrievable breakdown of the marriage. Indeed, if a greater difference can exist within the context of a marriage relationship than one between the spouses where one refuses to continue as the spouse of the other, we are at pains to conceive of it. As observed by Justice Robertson of the Supreme Court of Mississippi:
>
> > 'That one spouse out of blindness, obstinance or nostalgia refuses to recognize it hardly means that a marriage may not in fact * * * be irretrievably broken. As a matter of common sense, there can be irreconcilable differences within a marriage even when one spouse refuses to accept or recognize that fact.'
>
> (*Gallaspy v. Gallaspy* (1984), 459 So. 2d 283, 287 (Robertson, J., dissenting).) We believe a contrary interpretation of section 401(a)(2)

> would be inconsistent with the intent to provide a no-fault provision for dissolution of marriages." *Smoller*, 218 Ill. App. 3d at 345, 578 N.E.2d at 259.

Under the no-fault provision of section 401(a)(2), a marriage may be dissolved without a determination of the fault of either party where three conditions exist: the parties have lived separate and apart for a continuous period in excess of 2 years; irreconcilable differences have caused the irretrievable breakdown of the marriage; and efforts at reconciliation have failed or future reconciliation attempts would be impracticable and not in the best interests of the family. Ill. Rev. Stat. 1991, ch. 40, par. 401(a)(2), now codified at 750 ILCS 5/401(a)(2) (West 1996); see Ill. Ann. Stat., Historical & Practice Notes, Supp. at 19 (Smith-Hurd 1980). An irretrievable breakdown of the marriage has been defined as where either or both parties are unable or refuse to cohabit and there are no prospects for a reconciliation. See *In re Marriage of Dowd*, 214 Ill. App. 3d 156, 573 N.E.2d 312 (1991). See also Ill. Ann. Stat., Historical & Practice Notes, Supp. at 20 (Smith-Hurd 1980).

Here, the petitioner established irreconcilable differences. She testified that she and the respondent had lived separate and apart for more than two years; that irreconcilable differences existed between them; that their efforts at reconciliation had failed; and that future reconciliation attempts would not be in the best interests of the family. Once these elements were established, any endeavor by the respondent to disprove them would have been futile since the court was obligated to grant dissolution based upon the petitioner's

testimony alone. See *Smoller*, 218 Ill. App. 3d 340, 578 N.E.2d 256. See also *In re Marriage of Bates*, 141 Ill. App. 3d 566, 490 N.E.2d 1014 (1986) (trial court ordered on remand to enter judgment for dissolution of marriage on irreconcilable differences grounds even though case proceeded to trial upon grounds of mental cruelty).

Here, it appears from the questions posited to the trial court by respondent's counsel, that respondent intended to disprove certain of the incidents testified to by the petitioner, and he intended to prove that at some time previously the petitioner had indicated in diary entries that her feelings toward the respondent were ambivalent. Even if he were allowed to cross-examine the petitioner on those subjects, he would not have been able to disprove or discredit petitioner's testimony that on the date of the hearing she did not wish to reconcile with the respondent and did not wish to live together as husband and wife. In this regard, we note that during the custody hearing, the respondent did contradict some of petitioner's testimony with respect to some of the incidents she had described during the hearing on grounds. He also admitted others. The record also shows that he admitted that he and the respondent could not successfully communicate with each other and that petitioner told him that she was getting a divorce because she did not "want to deal with [him]." Independent of this direct testimony is the clear inference from the record that the parties could not get along and that their marital problems "have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed." *Bates*, 141 Ill. App. 3d at 570, 490 N.E.2d at 1016. It is clear that

irreconcilable differences existed and that the marriage should be dissolved on that no-fault basis. See *Bates*, 141 Ill. App. 3d 566, 490 N.E.2d 1014 (trial court ordered on remand to enter judgment for dissolution of marriage on irreconcilable differences grounds even though case proceeded to trial upon grounds of mental cruelty).

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

GORDON, J. with LEAVITT, P.J. and COUSINS, J., concurring.

[Entered May 18, 1998]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT–FIFTH DIVISION

In re the Marriage of:	)	
	)	
LINDA EHGARTNER-SHACHTER,	)	
	)	
Petitioner-Appellees,	)	
and	)	No. 1-95-1110
	)	
	)	
JAY F. SHACHTER,	)	
	)	
Respondent-Appellant.	)	

ORDER

The Petition for Rehearing of respondent-appellant is DENIED.

/s/ Marvin Leavitt
Presiding Justice
Marvin Leavitt

/s/ Joseph Gordon
Justice Joseph Gordon

/s/ William Cousins
Justice William Cousins

IN THE
SUPREME COURT OF ILLINOIS

October 6, 1998

No. 85713

LINDA EHGARNER-SHACHTER, respondent, v. JAY F. SHACHTER, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1998.

Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035